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NEW YORK MORTGAGES AND THE RECORDING ACTS.

Seemingly the Real Property Law of New York[1] has been made the scape-goat for a very radical change of base in the Courts with respect to the rights of assignees of mortgages in that State. As a matter of fact the result to which reference is made had been foreshadowed long before the law assumed its present form, and a comparison of the phraseology of the former Revised Statutes[2] with that of the Real Property Law (Sec. 241) will not reveal any sufficient ground for the *volte-face* which the recent decisions of the Courts reveal:

I Rev. Stats. 756, §1.	Real Prop. Law, § 241.
"Every conveyance of real estate within this State hereafter made	"A conveyance of real property within the State
	* * *
shall be recorded.	may be recorded
* * *	* * *
Every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration	Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration from the same vendor his heirs or devisees
of the same real estate or any portion thereof, whose conveyance shall be first duly recorded."	of the same real property or any portion thereof whose conveyance is first duly recorded."

Here is no radical change, the asterisks denoting only an omission in both acts of provisions as to acknowledgment or proof, and as to the place of recording. The only change of im-

[1] Chap. 46 of the General Laws, passed May 12th, 1896; chap. 547, Laws of 1896.

[2] I R. S. 756, §1.

portance in the language of the statute is the phrase defining the innocent purchaser for value as one purchasing "from the same vendor, his heirs or devisees,"—a change which does not come within the scope of this paper.

In the Report of the Commissioners of Statutory Revision, the old section of the Revised Statutes is stated to be unchanged in substance by the new.[1]

By Section 240 of the Real Property Law the term "conveyance" is defined to include "every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, and although the power be one of revocation only, except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property."

Further, "the term 'real property' as used in this article includes lands, tenements, and hereditaments, and chattels real, except a lease for a term not exceeding three years." Also, "the term 'purchaser' includes every person to whom any estate or interest in real property is conveyed for a valuable consideration, and every assignee of a mortgage, lease, or other conditional estate."[2] This is likewise stated by the commissioners to be the former provision of the Revised Statutes (§§ 36, 37, 38, 39 and § 114, p. 736) unchanged in substance.[3] As it is not questioned that leases of over three years, mortgages, releases, assignments and satisfactions of mortgages were subject alike to those provisions of the Revised Statutes and of the present Real Property Law, to which this investigation relates, we need not dwell further on the comparison of definitions.

The difficulty of adjusting the rights of successive holders of deeds and mortgages was recognized by the original revisers of the Statutes and was sought to be obviated by them, as their notes clearly show. Thus they say:

"The term 'conveyance' is defined in § 32; and as there defined includes mortgages; the effect of which will be to place deeds and mortgages on the same footing.

"The rules of priority as it respects deeds and mortgages, under the

[1] For text see Fowler, Real Property Law of the State of New York. App. I, 726.

[2] Real Property Law § 241.

[3] For text see Fowler *ut supra*.

present statutes, are different, as has been decided by the Supreme Court (19 Johns, 282) and as the terms of the laws plainly show. A mortgage, *not recorded*, is absolutely void, as against a subsequent *bona fide* purchaser, although the mortgage may be subsequently recorded before the recording of the conveyance of the purchaser. But as between two deeds, in all cases, and between two mortgages, the time of recording is the only test of the rights of the parties. No reason can be perceived for a distinction between the cases; and whichever rule is the most just, should be applied equally to all. The recording of an instrument is a public act, which fixes the date of its delivery beyond all question; and by requiring that test in all cases, vigilance will be promoted, and the temptation to fraud by the concealment of deeds will be removed.

"There is another distinction between deeds and mortgages which this section will also abolish. The first mortgage, although first recorded, if not given in good faith and for a valuable consideration, is absolutely void as against any subsequent mortgagee or purchaser; so that the right of an assignee of such first mortgage, who had no notice of the fraud, would be postponed. But an innocent purchaser under a fraudulent *deed* first recorded is entitled to a preference against any subsequent purchaser or mortgagee. It seems evident that an innocent *assignee*[1] of a *mortgage*[1] is entitled to the same protection as an innocent purchaser."[2]

Thus the Revisers attempted to effect one dead level for the two classes of instruments, ignoring the fundamental difference which the courts of this State had created between them—one being a legal estate, whose validity as against a subsequent purchaser depended only on possession or compliance with the recording act, while the other, a mere lien securing a debt, could not generally be evidenced by possession, and, if affected by illegality or payment of the amount secured thereby, could have no virtue injected into it by the act of recording, be it assigned or transferred into no matter how many innocent hands, and for value!

The seed thus sown has now after many years of germination sprung up to bear its forbidden fruit.

Coincident with the body of rights and privileges established by the Revised Statutes with respect to recorded instruments of certain character affecting real property, and continued, as we have seen, by the present Real Property Law, there had long existed what was known as the doctrine of notice by possession.

As possession had through the long history of the common law been the foundation and primary source of all title to land, and continued to be, as it still is, the best evidence of title, it was inevitable that it should be respected and its effect recognized by the Courts. It is not surprising therefore that the legislation which aimed to rest priority among successive grantees of land

[1] These italics are the writer's.

[2] For text see Fowler, Real Property Law of the State of New York. App. II, 799.

solely on the public record of conveyances should be supplemented and corrected by the Courts and "possession as notice" restored to its proper place in the law. Thus the "good faith" of the purchaser to be protected under the terms of the Recording Act, was construed to be without notice to be derived from inquiry into actual possession, as well as such notice as he might have to put him on inquiry, relating to a prior unrecorded instrument; and the purchaser to be protected shortly came to be known as the purchaser "without notice," and that notice to be classified as "actual" or "constructive."

It was only as between mortgagors, mortgagees, and assignees of the same mortgage or different ones affecting the same property that trouble was experienced. A deed or lease, as we have seen, presumes possession of some sort, but a mortgage by its very nature and by the settled habits of the community excludes any such presumption. When to this is added the lack of negotiability of the mortgage unless securing a promissory note before maturity, and its precarious character, it will be evident that, between the Real Property Law and the doctrine of *notice from possession*, the Courts would not find the task of adjusting the priorities between the assignee of a mortgage and other parties in interest an easy one.

One of the first acts of the Courts was to limit the operation of the Recording Act with respect to the recording of assignments of mortgages to assignments of the same mortgage,[1] leaving the assignee unprotected against outstanding equities of which he had no notice, actual or constructive; but this doctrine could not be sustained in the face of the declared intent of the statute respecting assignments as expounded by the Revisers, and, in a case which followed close upon the heels of those just cited,[2] the narrower construction of the Statute was repudiated and a long step taken in the direction of giving legal effect to the views of the Revisers. This case declared that while it was "doubtless true that it was one object of the provision for recording assignments of mortgages to protect a subsequent assignee of the mortgagor of the same mortgage from being defrauded through a prior assignment not before required to be recorded and of which he might have no notice," yet that this was not its only purpose; that the record of the assignment would give the assignee

[1] Greene *v.* Warnick (1876) 64 N. Y. 220. 226; Crane *v.* Turner (1876) 67 *id.* 437; Westbrook *v.* Gleason (1879) 79 *id.* 23, 32.
[2] Decker *v.* Boice (1880) 83 N. Y. 215.

in good faith and for value priority over a prior unrecorded mortgage or deed, although his assignor, tainted with notice, could not so have profited.

With this first step retaken therefore in the direction of enlarging the rights of the assignee of a mortgage who should record his assignment in advance of prior collateral conveyances of the same property, there still remained the fact that an assignee of a mortgage was after all but the purchaser of a chose in action —not of a negotiable security, with the rights peculiar to its own sacred necessities of negotiability under the Law Merchant—unless, indeed, it was made to secure such an instrument. At this stage the condition of things cannot be better expressed than in the text of a standard work on mortgages.[1]

"In the transmission of property of any kind from one person to another, the former owner can, in reason, only transfer what he himself has to part with, and the other can only take what is thus transferred to him. * * * The rule as generally stated is, that the purchaser takes only the interest which his assignor had to part with. * * * In other words, as the doctrine is more commonly expressed, the assignee of a chose in action takes it subject to the same equities to which it was subject in the hands of the assignor."

To give effect to the expressed intention of the Revisers that the purchaser of a mortgage should be entitled to the same protection as an innocent purchaser by deed, while at the same time recognizing that the mortgage was, unless securing a current promissory note, but a chose in action, subject to existing equities, and that record-notice was only one form of notice, co-equal only with notice from possession—this became the task of the Courts. And here was the point from which three paths diverged, along which the Courts were to travel logically and consistently, as three divisions of an army toward a given destination, unaware that when they should converge and meet, as they have since done, they should find themselves, unlike the divisions of a friendly army, face to face in opposition.

For long it seemed as though success might attend the effort to give the assignee of a mortgage the full protection of the statute without derogating from the principle that the assignee takes the mortgage subject to all equities which might be asserted against his assignor. In Bush *v.* Lathrop,[2] Greene *v.* Warnick,[3] Bennet *v.* Bates[4] and up to 1905 in the case of Quackenbush *v.* Wheaton,[5] the latter doctrine was fully recognized, as set forth in the opin-

[1] Thomas on Mortgages. 2nd ed. (1887) §310 p. 216.
[2] (1860) 22 N. Y. 535.
[3] (1876) 64 *id.* 220.
[4] (1884) 94 *id.* 354, 363.
[5] (1905) 46 Miac. 357.

ion of the able Justice sitting in Special Term of the Supreme Court, First Department, in the last cited case:

"The correct theory is well stated in 2 Story on Equity Jurisprudence, Section 1040: 'Every assignment of a chose in action is considered in equity as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt, or reduce the property into possession.' This theory would lead to the conclusion that the action by the assignee must be precisely commensurate with that of the assignor. * * * [Cases cited] seem fully to sustain the doctrine that an assignee of a mortgage takes no other or greater rights than the assignor."

Continuing on the other hand the protection accorded the purchaser of a mortgage through the recording of his assignment, it was held that "the record of an assignment of a mortgage is constructive notice to all persons of the rights of the assignee, save as excepted by the statute (*Viele v. Judson*, 82 N. Y. 32)," and that while "the recording of an assignment of a mortgage is not, of itself, notice of such assignment to the mortgagor, his heirs or personal representatives, (they being expressly exempted by the statute) so as to invalidate any payment made by them, or either of them, to the mortgagee," neither grantees of the mortgaged premises nor any others acquiring rights therein are within the protection of the Act and as to all such the recording of the assignment is notice.[1]

As to the debtor or owner of the mortgaged land, on the other hand, and his dealings with his creditor we have already seen that his rights as well as those of his heirs and personal representative had been carefully considered and excepted.

In an early case,[2] followed successively by others to the same effect,[3] the general doctrine was broadly stated: "It is a well established rule that the assignee of a bond and mortgage if he wishes to protect himself against *bona fide* payments by the mortgagor to the mortgagee must notify the mortgagor of the assignment." Payments upon a mortgage wrongfully received by the mortgagee after parting with it were held entitled to be credited.

While the rights and disabilities of assignees of mortgages, derived from the nature of the instrument and acquired by record, were thus being fully established in the courts, the doctrine of notice from possession, as affecting the rights to be acquired by record, was also being maintained.

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[1] Brewster *v.* Carnes (1886) 103 N. Y. 556.

[2] Belden *v.* Meeker (1872) 47 N. Y. 307.

[3] Van Keuren *v.* Corkins (1876) 66 N. Y. 77; Viele *v.* Judson (1880) 82 id. 32; Stoddard *v.* Gailor (1882) 90 id. 575; People *v.* Bank (1894) 75 Hun 114; aff'd (1894) 142 N. Y. 644.

The rule as laid down in a leading treatise,[1] that "Possession of land is constructive notice to a purchaser, mortgagee or others of the occupant's title and equities," was supported by innumerable authorities.

The Court of Appeals recognized the doctrine in its fullest extent as on equal terms with the doctrine of constructive notice obtained through the force of the Recording Act. "It is a very plain proposition of law, that a person in the actual possession of real estate gives notice to all the world proposing to deal with it, of his legal and equitable rights, and every one deals at his peril, if he fails to make due inquiry."[2] "Although the deed to Clement Sweet [grantee of the mortgaged premises] was not recorded until long after it was made, the notice which possession would afford [to the assignee of the mortgage] of his rights was furnished by the fact that he went into actual possession."[3] "Actual possession of real estate is sufficient notice to a person proposing to take a mortgage on the property, and to all the world, of the existence of any right which the person in possession is able to establish."[4] The operation of an elevated railroad in a street is open possession of the easements appurtenant to abutting lots, and puts a purchaser on inquiry as to the rights to such easements.[5]

So strongly and broadly was this doctrine established that, were it not for its being the point of entrance for the wedge of change in the law later on, we should not be justified in adding further or more varied illustration. But one more case will suffice—also a railroad case:[6]

"The plaintiffs in this action took no means whatever of ascertaining upon what claim the elevated railway company based its right of possession, and unless such means were used they could not possibly be considered as not having notice of whatever claim the defendants might be able to assert."

In the Court of Appeals, it was added on affirmance:

"The defendants' possession of the easements operated to give notice to all the world of a claim of right in respect thereto, so as to put all purchasers on inquiry."[7]

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[1] "Gerard on Titles," Ch. XXVI, Title V, pp. 667-668.
[2] Cavalli *v.* Allen (1874) 57 N. Y. 508, 517.
[3] Frear *v.* Sweet, (1890) 118 N. Y. 454, 462.
[4] Phelan *v.* Brady, (1890) 119 N. Y. 587, 591, 592.
[5] Ward *v.* Met. El. Ry. Co. (1894) 82 Hun 545.
[6] Mitchell *v.* Railway Co. (1890) 56 Hun 543.
[7] Mitchell *v.* Railway Co. (1892) 134 N. Y. 11, 14.

While the scales of justice had thus far been maintained with exact balance, though suspended as by a hair, very extreme ground had, as we have seen, been taken in all directions.

In the last case which bears out the old positions in all their completeness[1] the attempt had been made by the assignee of a mortgage to foreclose it according to its original terms, it having been orally extended prior to its assignment, but the plaintiff being without notice of such agreement. The Court (New York Special Term) found for the defendants, the learned Justice saying:

"As a case of first impressions there would appear to be no difficulty in holding that a mortgage being a chose in action, an assignee would be in the exact position of his assignor of the mortgage and would take the assignment subject to all defenses and equities that would have been available against the assignor. * * * Plaintiff, however, relies upon the statement in the case of Bank for Savings *v.* Frank, 45 N. Y. Super. Ct. 404, 409; 56 How. Pr. 403, that the general rule above stated 'does not extend to equities other than such as attend the original transaction.' An examination of the authorities bearing upon the point raised shows that Bank for Savings *v.* Frank, *supra* was cited and its reasoning relied on in the case of Gearon *v.* Kearney, 22 Misc. Repts. 285 Upon appeal, however, * * * the latter case was reversed * * * upon a theory which necessarily and in effect was opposed to the limitation of the rule laid down in the Bank for Savings case. * * * The case of Westbrook *v.* Gleason, 79 N. Y. 23, 29, 30; Green *v.* Warnick, 64 id. 220 and numerous other cases, many of them cited in the 'note on Title acquired by Assignee of Mortgage' appended to Squire *v.* Greene, 5 N. Y. Ann. Cas. 363, seem fully to sustain the doctrine that an assignee of a mortgage takes no other or greater rights than the assignor."

Well decided according to existing law! But the point of the wedge was visible. In the month following, in the Supreme Court, Appellate Division, of another Department, in an identical case, except that the extension was in writing instead of oral, but unrecorded, it was held by a divided Court that foreclosure should be decreed.[2]

The principle laid down in the preceding case, that the assignee takes the mortgage subject to all outstanding equities, is fully recognized, but is held to be qualified by the duty imposed by statute on the holder of such an equity to give notice thereof by recording the instrument creating it. The case is brought within the terms of the Recording Act by defining the agreement for the extension of the mortgage, inasmuch as it "modified the terms of the original mortgage in important respects," as a part of the mortgage and therefore as in itself "a conveyance of real property."

[1] Quackenbush *v.* Wheaton (1905) 46 Misc. 357, 358, 359.
[2] Weidemann *v.* Zielinska (1905) 102 App. Div. 163.

Another small case[1] of no importance except as it illustrates the breaking down of the doctrine of notice from possession, was that of an unrecorded informal lease of over three years under which the tenant was in actual possession of the premises leased. He was promptly dispossessed at the instance of a purchaser of the property who, finding no record of the lease, took care not to make further inquiry, the Court sustaining him on the ground that the lease being for a period of over three years and not being of record was void as against the purchaser. The final and most important case[2] of the day, giving the sanction of the Court of Appeals to the change of base being effected, cannot here be given the attention it deserves, but its importance and revolutionary character will ensure its careful study and scrutiny.

Let it suffice to say that an unrecorded release of the mortgage made by the holder thereof to the owner of the premises is set aside in favor of a subsequent assignee of the mortgage who was without actual notice of its existence; the doctrine that the assignee takes the mortgage subject to the equities that may be enforced against the assignor, limited to the equities that "attended the transaction between the original parties"—such, that is to say, as are usually embodied in the instrument evidencing the mortgage debt; and the notice from the actual, open and visible possession of the strip of land released, by the railroad company to which the release had been given, disregarded on the ground that such possession is not necessarily inconsistent with the continued existence of a mortgage on the land. That this result was reached by a divided court, three of the seven judges dissenting and two of them recording their dissent in vigorous opinions, seems not only to support the contention of this paper that the law governing the rights of mortgage assignees under the recording acts, slowly built up in a long series of careful and able decisions, has been unsettled if not radically changed by the latest decisions; but also holds out the hope that the Courts of this State may in no long time restore the ancient landmarks of the law.

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[1] Jokinsky *v.* Miller (1904) 44 Misc. 239.
[2] Gibson *v.* Thomas (1905) 180 N. Y. 483.